

BEFORE THE
Federal Communications Commission

WASHINGTON, D C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Policies and Rules Concerning) CC Docket No. 93-292
Toll Fraud)

To the Commission:

REPLY COMMENTS
OF THE
AMERICAN PETROLEUM INSTITUTE

AMERICAN PETROLEUM INSTITUTE

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Dated: February 10, 1994

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SUMMARY

There is broad user support for the adoption of rules shifting liability for toll fraud from the user to the party most responsible for the fraud. The approach to liability proposed by the Commission and endorsed by many commenters fails to apportion responsibility for toll fraud losses in an equitable manner, and fails to provide appropriate incentives for all parties to exert maximum efforts to prevent the occurrence and minimize the amount of such fraud. In particular, the Commission's proposal fails to provide carriers with an incentive to monitor their networks for unusual calling patterns and to immediately notify affected users when such patterns are discovered. The Commission can provide an incentive for carriers to mitigate fraud losses by (1) shifting liability to the carrier when it fails to timely notify the user of suspected fraud (or fraud which, through due diligence, should have been detected) and (2) limiting liability for toll fraud to a carrier's cost of providing service.

The carrier position that the marketplace is working and that warnings are sufficient to combat toll fraud is contradicted by the experience of many toll fraud victims. The carriers have provided no persuasive justification why

they should not be required to provide monitoring and detection capabilities as a part of their basic service offerings.

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The American Petroleum Institute ("API"), by its attorneys, hereby submits its Reply Comments in response to the Comments filed by other parties in response to the Notice of Proposed Rule Making ("NPRM") issued in the above-captioned proceeding.

I. DISCUSSION

A. Reallocation of Liability

1. Over 100 parties filed comments in response to the NPRM. The overwhelming majority of commenters agreed that there needs to be some shift in liability for toll fraud in order to provide all relevant parties with an incentive to prevent and/or detect toll fraud. However, the specific methods of reallocating liability supported and proposed by

these commenters fail to adequately address the problem. The interexchange carriers ("IXCs") and equipment manufacturers have denied any responsibility for CPE-based fraud. Meanwhile, the users and other parties filing comments in this proceeding all failed to present a comprehensive, workable solution to the liability issue.

2. API was disappointed to see that no IXC filing comments in this proceeding was willing to accept any responsibility for its role in toll fraud. On the whole, IXCs contended that the user should remain responsible for all CPE fraud.^{1/} These arguments were based in large part on the position that only the user has the ability to control its CPE.^{2/3/} Such arguments ignore two critical points. First, many instances of CPE fraud occur as a

^{1/} See, e.g., Comments of MCI Telecommunications Corporation ("MCI") at p. 5; the Interexchange Carrier Industry Committee Toll Fraud Subcommittee ("ICIC-TFS") at p. 6; Competitive Telecommunications Association ("CompTel") at p. 2; and WilTel, Inc. and WilTel Communications Systems, Inc. ("WilTel") at pp. 2-3.

^{2/} See, e.g., Comments of MCI at pp. 5-8; ICIC-TFS at p. 6; WilTel at pp. 2-3.

^{3/} One IXC representative found support for this position in the Commission's Chartways decision. Comments of ICIC-TFS at pp. 3-4 (citing Chartways Technologies, Inc. v. AT&T Communications, 8 FCC Rcd 5601 (1993)). However, in Chartways, user control was stipulated. Chartways does not stand for the proposition that all CPE fraud is the responsibility of the user.

result of illegal entry through a PBX's remote maintenance port, a point of access controlled by an entity other than the user. Second, with one possible exception,^{4/} the IXCs completely ignore their ability to mitigate ongoing fraud. Although the IXCs did not generally dispute their ability to monitor and detect the occurrence of ongoing fraud, they appear to abdicate any responsibility to act on that information by making timely notification of the existence of ongoing fraud to the affected user.

3. AT&T filed comments suggesting that the marketplace has been "successful" in resolving toll fraud disputes and requesting that market forces be allowed to continue to allocate the risk of toll fraud.^{5/} AT&T clearly has a different definition of "success" than that of most users. The numerous toll fraud victims who testified at the Commission's En Banc hearing, filed comments in response to that hearing, and filed comments in this proceeding have overwhelmingly rejected the notion that the risks of toll

^{4/} The Telecommunications Resellers Association ("TRA"), an association of switchless resellers, properly recognized that it is the carriers who are in the best position to minimize fraud. See Comments of TRA at pp. 6-7. It also acknowledged that carriers should bear some responsibility for toll fraud. Id. at p. 6.

^{5/} Comments of American Telephone and Telegraph Company ("AT&T") at pp. 8-17; See also Comments of WilTel at pp. 5-7.

fraud have been "successfully" allocated. Perhaps the success which AT&T refers to is the profit it has derived from carrying millions of dollars worth of unauthorized calls.

4. Of the users filing comments in this proceeding, all agreed that there needs to be some reallocation of liability for toll fraud. The majority of users endorsed the Commission's proposed comparative negligence approach to reapportioning liability. However, as API emphasized in its Comments, such an approach fails to apportion responsibility for toll fraud losses in an equitable manner, and it fails to provide appropriate incentives for all parties to exert maximum efforts to prevent the occurrence and minimize the amount of such fraud. Most importantly it ignores the responsibility of carriers to mitigate. Carriers must be given an incentive to monitor their networks for unusual calling patterns and to immediately notify affected users when such patterns are discovered. As one commenter correctly noted, "there is no consequence to the carrier from failing to notify a customer in a timely manner of suspected fraudulent calling."^{6/}

^{6/} Comments of the Communications Managers Association, the New York Clearing House Association and the Securities Industry Association ("CMA, et al." at p. 8.

5. The current liability scheme under which carriers have forced users to assume liability for CPE fraud has resulted in skewed incentives. Carriers are in a much better position than users to take the lead on fraud prevention. As the North American Telecommunications Association ("NATA") stated, "carriers are far better situated than other parties to take the kinds of systematic, centralized measures that can effectively control toll fraud."^{7/} Yet, due to the carriers' ability to continue to profit from fraudulent calls, they have refrained from taking such measures.

6. The Commission can provide an incentive for carriers to mitigate fraud losses by (1) shifting liability to the carrier when it fails to timely notify the user of suspected fraud (or fraud which, through due diligence, should have been detected) and (2) limiting liability for toll fraud to a carrier's cost of providing service.^{8/} Comments filed by a group of user associations recognized the importance of using a shift in liability to encourage prompt carrier action. CMA, et al. proposed that an IXC be

^{7/} Comments of NATA at p. 4.

^{8/} API's full proposal for allocating liability for toll fraud is set out at pages 6-12.

held liable for fraud losses where it fails to notify a user within 30 minutes of a particular user calling parameter being exceeded.^{2/} API agrees with CMA's emphasis on holding the carriers responsible for timely response. However, CMA's approach fails to address the significance of user acknowledgement of a carrier's fraud notification. Under CMA's approach, if a customer fails to take steps to mitigate unauthorized use after being notified of usage anomalies, the customer would be responsible for the loss. The customer should not be held liable for such losses unless the notice has actually been received and acknowledged by the user. Because much toll fraud occurs on weekends and in the evening, the mere act of carrier notification without acknowledgement of receipt should not be enough to relieve the carrier of liability.

7. Several commenters agreed that user liability should be limited where the user has taken certain defined security measures. See, e.g., Comments of the Ad Hoc Telecommunications Users Committee ("Ad Hoc") at p. 2 (all losses not due to user negligence should fall on the carrier); Comments of NATA at p. 9 (where user has taken reasonable steps to prevent fraud, it may not be held

^{2/} Id. at p. 6.

liable). RAK Associates suggested that user liability be "capped" where the customer has engaged in security measures and the carrier has failed to notify the user of possible fraud.^{10/} While API does not disagree with such approaches, it should be made clear that any required security measures must be affordable to the average user. See Comments of Pinellas County, Florida ("Pinellas County") at p. 5. API agrees with the commenters who urged the Commission to declare unlawful IXC tariff provisions which automatically shift liability to the end user regardless of fault.^{11/}

8. A number of commenters identified the carriers' ability to profit from fraud as a disincentive to taking measures to prevent or mitigate toll fraud.^{12/} Not only is the current arrangement whereby carriers profit from user misfortunes highly unfair, it provides the carriers with

^{10/} Comments of RAK Associates ("RAK") at p. 4. This approach echoes the approach to liability taken by Congress in H.R. 6066 introduced in 1992. See Telephone Toll Fraud Remedies Act of 1992, H.R. 6066, 102d Cong., 2d Sess. (1992). That bill would have limited user liability to one third of the disputed amount.

^{11/} See Comments of Planned Parenthood of New York City and Reynolds and Reynolds ("Planned Parenthood") at pp. 4-5; See also Comments of FMC Corporation.

^{12/} See, e.g., Comments of CMA, et al. at p. 4; Van Hoy, Reutlinger and Taylor ("Van Hoy") at p. 3; the Utilities

little incentive to extricate themselves from what one commenter termed their "silent partners[hip]" with fraud perpetrators.^{13/} Carriers should not be allowed to profit from carrying unauthorized calls. API agrees with the Telecommunications Association that user liability should be limited to an IXC's actual out-of-pocket costs.^{14/}

9. The majority of equipment manufacturers filing comments argued that they should not assume any liability for toll fraud. For the most part, such comments are self serving. For example, LinkUSA proposed that carriers should be relieved of all liability if the user fails to purchase fraud monitoring equipment such as that manufactured by LinkUSA. As API argued in its Comments, and the vast majority of users also argued, manufacturers should be proportionately liable for toll fraud losses to the extent that they are in a position to prevent such losses. At a minimum, PBX manufacturers should be liable for any unauthorized usage occurring over the remote maintenance port. See Comments of TCA at p. 7.

^{13/} See Comments of Van Hoy at p. 3.

^{14/} Comments of the Tele-Communications Association ("TCA") at p. 9.

B. Carrier Responsibilities

10. In its Comments, API argued that fraud monitoring and detection capabilities should be an integral part of carrier service offerings rather than optional features available only at an additional charge. The majority of users filing comments on this issue agreed with API that the carriers should be required to offer such services.^{15/} Several carriers filed comments opposing such a requirement. The two major IXCs addressing this issue -- AT&T and MCI -- each argued that mandatory monitoring and detection offerings are unnecessary because such offerings are already available on the open market. As discussed above, the carriers should not profit from the offering of fraud monitoring services. Such services should be offered at

^{15/} API agrees with the proposal of CMA, et al. that IXCs be required to offer at cost-based rates a package of basic services including customized call blocking features, real-time security reports, and call monitoring via trunk-based parameters that would signal sudden spikes in call volume, unusual call patterns, or sudden increases in calls to particular area codes or countries. Comments of CMA, et al. at p. 5. In this regard, it is particularly important that the trunk-based parameters be selected by the customer. Some users with a high volume of international calling may wish to set such parameters at a high level. However, others may desire notification at lower thresholds. In any event, users should be given the option of what type of parameters to use and what level to set them at.

cost and should not be bundled with carrier toll fraud "insurance" offerings.^{16/}

11. In opposing the proposed monitoring and notification requirement, AT&T referred to the difficulty of notifying users when the network on which the fraud is occurring is not that of the presubscribed carrier. Although API recognizes the validity of this concern, it does not provide a justification for evading notification. Rather, it is an issue that requires an industry solution. One possible method of addressing the problem would be for the carriers to arrange for the establishment and administration of a database of telephone numbers of individuals who wish to be contacted in a toll fraud emergency. In any event, the responsibility for developing a capability to satisfy their toll fraud emergency notification requirements should reside with the carriers.

12. All users and the majority of carriers addressing the Commission's proposal that carriers be required to warn their customers of the risk of toll fraud supported the

^{16/} The vast majority of parties filing comments in this proceeding agreed with API that the standard IXC toll fraud insurance offerings are too expensive and of limited utility. See, e.g., Comments of CMA, et al. at p. 7; AgriBank FCB at p. 1; Albany International Corp. at p. 1.

proposed requirement. API support this proposal and agrees with the comments filed by Himont USA, Inc. that warnings should be provided to the customer on a regular basis.^{17/} Sprint Corporation claims that the language in its tariff provides sufficient warning of the risks of toll fraud.^{18/} However, the quoted language gives the uneducated user no clue as to the possibility of PBX fraud.^{19/}

13. API agrees with the Pennsylvania Public Utility Commission that carriers should be required to notify manufacturers and subscribers of network changes which may affect the prevention or detection of toll fraud within a reasonable period of time before such changes occur.^{20/} API also agrees with the suggestion of Stephen Satchell that

^{17/} Comments of Himont USA, Inc. ("Himont") at p. 1.

^{18/} Comments of Sprint Corporation at p. 7.

^{19/} The tariff language states only that unauthorized use of the subscriber's facilities may occur and that such use includes "the placement of calls from the subscriber's premises, and the placement of calls through subscriber-provided equipment which are transmitted or carried on the Sprint network." Such language looks more like a classic "fine print" disclaimer than the educational warning envisioned by the Commission.

^{20/} See Comments of the Pennsylvania Public Utility Commission at p. 3.

operator service providers be required to notify users of failed third party call attempts.^{21/}

C. Manufacturer Responsibilities

14. Virtually every party addressing the Commission's proposed Part 68 amendments supported the Commission's proposal to require equipment manufacturers to provide warnings regarding the potential risk of toll fraud and the consequent liability exposure associated with use of the equipment. A number of parties agreed with API that this requirement should be a continuing obligation.^{22/} As UTC commented, "CPE vendors should also be under a continuing duty to alert customers of known methods to circumvent the CPE's fraud-prevention capabilities."^{23/} API agrees with these parties, but believes that additional obligations should be imposed on manufacturers. As API proposed in its Comments, manufacturers should be under a continuing duty to investigate how their equipment can be used to accommodate toll fraud. Relatedly, manufacturers should be required to

^{21/} See Comments of Stephen Satchell at p. 10.

^{22/} Comments of UTC at p. 6; Himont at p. 1.

^{23/} Comments of UTC at p. 6.

make equipment upgrades that cure fraud-enabling defects or shortcoming available to all customers at nominal cost.^{24/}

15. In its comments, NATA expressed concern with the difficulty of providing warnings to their embedded customer base. Such concern should not relieve vendors of their responsibility to warn. Vendors should be required to establish procedures to receive notification of customer change of address or resale of equipment.

16. API agrees with Ad Hoc that the Commission should ensure that any regulations that require specific warnings will not be deemed to preempt customers' remedies against vendors under state laws. In this regard, API supports the adoption of the language proposed by Ad Hoc. See Comments of Ad Hoc at pp. 8-9.

D. Responsibilities of Equipment Maintenance Providers

17. In its Comments, API discussed the important role in toll fraud played by the CPE maintenance entity. API was pleased to see that a number of parties recognized that maintenance entities must assume some responsibility for

^{24/} See also Comments of CMA, et al. at p. 9; RAK at p. 3.

toll fraud. API agrees with the comments filed by Leucadia National Corporation and American Investment Bank, N.A. and Planned Parenthood suggesting that the manufacturer's duty to warn be extended to equipment installers, communications systems consultants, sales agents and vendors.^{25/}

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully requests that the Federal Communications Commission take action in a manner consistent with the views expressed herein.

Respectfully submitted,

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^{25/} See Comments of Leucadia National Corporation and American Investment Bank, NA at p. 3; Planned Parenthood at pp. 11-12.